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IN THE
COURT OF APPEALS OF INDIANA

RYAN L. BERRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0607-CR-615
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable George A. Hopkins, Judge
Cause No. 34D04-0602-FB-23

January 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Ryan L. Berry challenges his three-year sentence for sexual misconduct with a minor as a Class D felony.[1] We affirm.

FACTS AND PROCEDURAL HISTORY

In September 2005, fourteen-year-old H.B. and her sister went to twenty-nine-year-old Berry's home to babysit for Berry's children. At some point that evening, Berry "measured [H.B.'s] breasts," (Appellant's App. at 12), kissed her on the lips three times, placed his hand "down her pants, panties and put his finger in her vagina." (*Id.*)

The State charged Berry with sexual misconduct with a minor as a Class B felony.[2] Berry pled guilty to the lesser-included offense of sexual misconduct with a minor as a Class D felony in exchange for dismissal of the Class B felony. The parties stipulated the probable cause affidavit established a factual basis for the guilty plea. Sentencing was left to the discretion of the trial court.

At sentencing, the trial court stated:

> I believe any sentence in this case should be aggravated because of Mr. Berry's past history, including at least one prior sex offense. While he may have a physical condition I do not find that as a mitigating circumstance. Matter of fact I do not find any mitigating circumstances whatsoever. Sentence Mr. Berry to three years in the Indiana Department of Corrections (sic). I'm going to order all of that executed. I don't see any advantage to be gained here by probation. I don't think that he's a candidate for In-Home Detention. I think the only proper place is the Department of Correction.

(Tr. at 27-28.)

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[1] Ind. Code § 35-42-4-9(b).
[2] Ind. Code § 35-42-4-9(a)(1).

DISCUSSION AND DECISION

Trial courts may impose any sentence authorized by statute regardless of the presence or absence of aggravating and mitigating circumstances. Ind. Code § 35-38-1.7-1(d). However, if a trial court relies on aggravating or mitigating circumstances to impose a sentence other than the advisory, it must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances. *McMahon v. State*, 856 N.E.2d 743, 749-50 (Ind. Ct. App. 2006).

Even when a trial court follows the proper procedure in imposing a sentence, Ind. Appellate Rule 7(B) authorizes independent appellate review and revision of the sentence: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the reviewing court that his sentence is inappropriate. *McMahon*, 856 N.E.2d at 749.

Berry argues the trial court "should have found the fact that Defendant plead [sic] guilty was a mitigating factor."[3] (Appellant's Br. at 3.)

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[3] At the sentencing hearing, Berry testified he has a seizure disorder, "bi-polar and ADHD." (Tr. at 17.) Counsel's argument concerning Berry's medical condition consists of one sentence: "Moreover, the court should have considered the Defendant's medical condition as a mitigating factor." (Appellant's Br. at 3.) Ind. Appellate Rule 46(A)(8) requires the appellant support each contention with argument, including citations to legal authorities, statutes, and the record for support. Failure to present cogent argument constitutes waiver of an issue for appellate review. *Hollowell v. State*, 707 N.E.2d 1014, 1025 (Ind. Ct. App. 1999). As counsel provides neither authority nor argument to support this claim, this issue is waived.

Indiana courts have long held that a defendant who pleads guilty is entitled to receive some benefit in return. *Williams v. State*, 430 N.E.2d 759, 764 (Ind. 1982), *appeal dismissed* 459 U.S. 808 (1982), *reh'g denied* 459 U.S. 1059 (1982). However, a guilty plea does not automatically amount to a significant mitigating factor, particularly if the defendant has already received a substantial benefit in exchange for pleading guilty. *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999).

Berry was charged with a Class B felony but pled guilty to a Class D felony. A person who commits a Class B felony can be sentenced to between six and twenty years. Ind. Code § 35-50-2-5. A Class D felony may be punished by a sentence between six months and three years. Ind. Code § 35-50-2-7. By pleading guilty, Berry reduced his possible jail time significantly—from a minimum of six years to a maximum of three years. The trial court should have acknowledged Berry's plea of guilty, *see Hope v. State*, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005) ("It does appear, however, that a trial court generally should make some acknowledgment of a guilty plea when sentencing a defendant."), but because Berry received a substantial benefit in exchange for pleading guilty, the trial court did not err in declining to find his guilty plea a significant mitigator.

The trial court found Berry's criminal history to be an aggravating circumstance. Any criminal history is "a possible and proper aggravator." *White v. State*, 756 N.E.2d 1057, 1062 (Ind. Ct. App. 2001), *trans. denied* 774 N.E.2d 505 (Ind. 2002). The significance of criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." *Wooley v. State*, 716 N.E.2d 919, 929 n.4

(Ind. 1999), *reh'g denied*. As noted by the trial court, Berry's criminal history includes a juvenile adjudication for "sexual battery and child molest." (App. of Appellee at 4.)

Although citing App. R. 7(B), Berry does not discuss "the nature of the offense or the character of the offender." Nor has Berry provided authority or cogent argument to support the claim his enhanced "sentence was inappropriate in light of the fact that there were mitigators that the court failed to weigh in determining the sentence." (Appellant's Br. at 4.) S*ee* App. R. 46(A)(8) (appellant must support each contention with argument, including citations to legal authorities, statutes, and the record for support). Failure to present cogent argument constitutes waiver of an issue for appellate review. *Hollowell v. State*, 707 N.E.2d 1014, 1025 (Ind. Ct. App. 1999).

Waiver notwithstanding, we conclude Berry's sentence is not inappropriate in light of his character and the nature of the offense. Regarding the nature of the offense, Berry fondled fourteen-year-old H.B. while she was babysitting his children. He placed his hand down her pants and underwear, and put his finger in her vagina.

Berry's character is demonstrated by his juvenile and criminal history. His juvenile record includes arson, sexual battery and child molest, and incorrigibility. He was placed on probation following the adjudication for sexual battery and child molest and re-offended, resulting in placement in a juvenile facility. As an adult, Berry has misdemeanor convictions for conversion, battery, and driving while suspended, and felony convictions for attempted fraud, possession of stolen property, and burglary. In each case, he was given probation or a suspended sentence with time served. As the pre-sentence investigation report notes: "It would appear that he has a lot of problems

learning from his past mistakes and has not taken advantage of the many breaks and opportunities the system has given him." (App. of Appellee at 5.)

After considering the aggravators, mitigators, Berry's character, and the nature of his offense, we cannot conclude his three-year sentence is inappropriate. Accordingly, we affirm.

Affirmed.

NAJAM, J., and MATHIAS, J., concur.